United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

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TO : Rhonda P. Ley, Regional Attorney

Region 3

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice 530-4850-0100

530-6067-0100 SUBJECT: E.I. DuPont de Nemours & Co. 530-6067-9500

Case 3-CA-26131 530-8045-0100

530-8045-3600 530-8045-9500 530-8054-0133

This Section 8(a)(5) unilateral change case, involving three annual Memorandums of Understanding, that were executed subsequent to expiration of a collective-bargaining agreement and that allocated the cost of health care benefits premiums between the Employer and the employees to a 70/30 percent cost share for a specified plan year, was submitted for advice as to whether the Employer unlawfully discontinued the 70/30 Employer/employee cost share at the end of the plan year specified in the parties' last Memorandum of Understanding.

We conclude that (1) the Employer could not change the status quo by discontinuing the 70/30 percent cost share absent either bargaining to impasse on or a Union waiver of its bargaining rights¹; but (2) under the Board's clear and unmistakable waiver standard recently reaffirmed in <u>Provena St. Joseph Medical Center²</u>, the Union waived its right to bargain over the Employer's cessation of the 70/30 percent cost share because, in light of the parties' past practice and consistent bargaining history surrounding the Memorandums of Understanding, the Union clearly intended that each Memorandum, and the 70/30 cost share specified therein, exist and be in effect for only one year.

FACTS

E.I. DuPont de Nemours & Co (Employer) operates several plants including one in Tonawanda, New York, where Steelworkers Local 4-6992 (Union) represents a unit of about 450 production and maintenance employees. The parties have been working without a collective-bargaining agreement since 1993. The Employer provided health care benefits to all employees, including unit employees at

¹ NLRB v. Katz, 369 U.S. 736 (1962).

² 350 NLRB No. 64 (2007).

Tonawanda, through its corporate-wide, self-insured Beneflex Plan. In the Fall of each Beneflex Plan year, all interested employees enrolled in the Beneflex Plan which would begin on the following January 1. However, Beneflex Plan costs and benefits changed from year to year. The Employer's practice in Tonawanda was to notify the Union of any changes in the next Beneflex Plan year in October, around one month before the annual open enrollment period began in November.

In 1994, the Employer declared an impasse in contract negotiations and implemented its final offer. That offer required the Employer and employees to share equally (50/50) in paying future increases in Beneflex Plan costs. The Union filed Section 8(a)(5) charges and a complaint issued, alleging that the Employer had unlawfully implemented its proposal because the bargaining impasse had been tainted. The parties entered into a settlement agreement which rescinded the 50/50 share of future Beneflex Plan cost increases and provided instead for an 80/20 share of future increased costs. The settlement provided that this share would remain in effect until either party gave notice to terminate the settlement agreement and bargained in good faith.

In 2000, the Employer notified the Union that it was terminating the settlement agreement. Negotiations over a new contract then resumed and continued throughout much of 2000. In early 2001, the Employer announced that in the event of an impasse, the Employer would implement its final offer which included, among other things, a 50/50 cost share of future Beneflex Plan cost increases.

Around this same time, the Employer terminated a side agreement that had allowed the Employer to use unit employees, but pay them less than their current wage rates, to perform millwork and finishing work. In early April, the Employer announced that it would subcontract this work unless the Union agreed to certain savings targets. Within days of this announcement, the Employer declared an impasse in the parties' contract negotiations and implemented the terms of its last offer. The implemented terms included the 50/50 cost share of future Beneflex Plan increases. In October 2001, the Employer relied upon its implemented offer to allocate a 50/50 cost sharing for the upcoming 2002 Beneflex Plan year.

The Union again filed Section 8(a)(5) charges. Complaint issued alleging, inter alia, that the Employer's failure to address the milling and finishing work subcontracting as part of overall negotiations constituted unlawful piecemeal bargaining, and that this unlawful

piecemeal bargaining tainted the impasse, making unlawful the Employer's implementation of the 50/50 cost share for the 2002 Beneflex Plan year. In December 2003, an ALJ decision issued finding these 8(a)(5) violations; the Employer filed exceptions.

In the interim, the Employer decided on a corporate-wide basis to change the 50/50 allocation of future Beneflex Plan cost increases in favor of a 70/30 cost share. The Tonawanda plant thus became the only facility where employees participated in the Beneflex Plan under a 50/50 cost share. In the Fall of 2002, the Employer offered the Union a choice of how to participate in the upcoming 2003 Beneflex Plan year: continue the existing 50/50 cost share, or agree to the corporate-wide 70/30 cost share. The Union chose not to agree to the 70/30 cost share, apparently because of the pending Board case. Employees at Tonawanda thus participated in the 2003 Beneflex Plan year under the 50/50 cost share.

In the Fall of 2003, the Employer again offered the Union a choice of participating in the 2004 Beneflex Plan year at the 70/30 cost share or continuing at the 50/50 cost share. The Union agreed to the 70/30 cost share as long as its agreement did not adversely affect the Union's position in the pending Board case. The parties therefore executed the following Memorandum of Understanding (MOU):

USW Local 6992 and Yerkes management agree to let the Members of USW Local 6992 enroll under the 2004 enrollment guidelines. This will result in Bargaining Unit Employees enrolling under the current 70/30 cost share as opposed to continuing to have the cost share based on the equal share of increases for a plan year as outlined in Article XVIII, Section 1, of the implemented Contract.

By expressing agreement to the 70/30 cost share option, the Union is not waiving any rights and remedies it may have under the National Labor Relations Act with regard to its charges currently pending before the Board.

Furthermore, this agreement is limited to enrollment under the 2004 guidelines only.

In the Fall of 2004, the parties agreed to the same MOU, limited to employee enrollment only in the 2005 plan year.

In the Fall of 2005, the Employer proposed an ongoing agreement, i.e., an MOU which would not apply to enrollment

for only one Beneflex Plan year but would continue from year to year until either party gave notice of termination. The Union rejected this proposal. The parties thus agreed to the same MOU, providing for a 70/30 cost share limited to employee enrollment only in the 2006 plan year.

In February 2006, the Board issued a decision which reversed the 2003 ALJ's finding of 8(a)(5) violations.³ The Board majority concluded that the Employer's separate negotiations over the subcontracting of milling and finishing work was not unlawful piecemeal bargaining; the impasse in negotiations was valid; and accordingly the Employer lawfully imposed its last offer, including the changes to the Beneflex Plan. 346 NLRB at 556-57. This Board decision thus rendered lawful the Employer's implementation of the 50/50 cost share for the 2002 Beneflex Plan year, and its continuation for the 2003 Beneflex Plan year. Id. at 558-59.

Several months later in July 2006, the parties resumed bargaining for a successor contract. The Employer's contract proposal included replacing the prior contractual 50/50 Beneflex Plan cost share with the 70/30 cost share to which the parties had agreed for the last three years via the MOUs. The Employer indicated it would agree to the 70/30 cost share solely as part of a complete bargaining agreement, and it would not sign another one-year MOU.

In September 2006, while the parties were bargaining, the Employer presented the Union with the health care costs and benefits for the upcoming 2007 Beneflex plan year under both the 50/50 and 70/30 cost shares. Noting that negotiations had become complicated, the Employer proposed that the parties agree to a "basic" contract incorporating the 70/30 cost share with other certain changes, and continue to bargain on remaining issues addressing them later with supplemental agreements. The Union rejected this proposal and insisted on negotiating a self-contained complete agreement.

The Employer stated that if the parties did not agree to a bargaining agreement incorporating the 70/30 cost share by the time open season for the 2007 Beneflex Plan year started on November 1, 2006, the Employer would require employees to enroll in the 2007 Beneflex Plan at the 50/50 cost share. The Union protested this as a unilateral change from the 2006 Beneflex Plan year. Nevertheless, in October 2006, the Employer announced that the 50/50 cost share applied to the 2007 Beneflex plan.

³ E.I de Pont & Co., 346 NLRB 553 (2006).

The parties have not yet reached agreement and are still engaged in contract bargaining.

ACTION

The Employer could not discontinue the 70/30 percent cost share absent a Union waiver of bargaining, but we conclude that the Union waived its right to bargain over the Employer's cessation of the 70/30 percent cost share because, in light of the parties' past practice and consistent bargaining history surrounding the Memorandums of Understanding, the Union clearly intended that each Memorandum, and the 70/30 cost share specified therein, exist and be in effect for only one year and then terminate, allowing the Employer to reinstate the 50/50 cost share.

Employee health benefits constitute a term or condition of employment which an employer may not unilaterally change absent a good faith impasse or union waiver of its right to bargain.⁴ This proscription against unilateral action applies not only to employment terms specifically covered in an expired contract, but also to "an activity which has been 'satisfactorily established' by practice or custom . . . or a 'longstanding practice'"⁵ Thus, the Employer's unilateral change of employee health benefits here violated Section 8(a)(5) absent the Union's waiver of its right to bargain over that change.⁶

 $^{^4}$ See, e.g., <u>Trim Corp. of America</u>, 349 NLRB No. 56 sl. op. at 9 (2007); <u>E.I. DuPont de Nemours & Company</u>, 346 NLRB at 558-60; see generally NLRB v. Katz, 369 U.S. 736 (1962).

⁵ Golden State Warriors, 334 NLRB 651, 652 (2001), quoting Exxon Shipping Co., 291 NLRB 489, 193 (1988) (citations omitted), enfd. Warriors v. NLRB, 50 Fed. Appx. 3 (D.C. Cir 2002).

⁶ Allied Signal, Inc., 330 NLRB 1216, 1228 (2000) (absent specific language indicating what happens after the expiration of agreement, terms of agreement continue until impasse); General Tire, 247 NLRB 591, 592 (1985) (in absence of explicit language indicating what would occur after 90 day extension of existing contractual benefit, no union waiver and employer unlawfully discontinued benefits); Cauthorne Trucking, 256 NLRB 721, 722 (1981) (explicit language stating that all obligations under pension trust agreement shall terminate upon expiration of contract expressed clear intent to relieve employer of obligations).

The Board recently reaffirmed its long-held position that the purported waiver of a union's bargaining rights is effective if and only if the relinquishment was "clear and unmistakable." In Metropolitan Edison Co. v. NLRB, the Supreme Court, agreeing with the Board, stated that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'." The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized in haec verba in the contract. As the Board noted in Provena, a waiver may be found if the contract either "expressly or by necessary implication" confers on management a right unilaterally to take the action in question. 10

The Board's analysis of two unilaterally implemented changes in Provena illustrates this principle. The Board first considered the employer's unilateral implementation of a monetary incentive policy to encourage nurses to volunteer to work extra shifts during a holiday period. The Board found that no contractual provision expressly addressed incentive pay. A contractual authorization to pay "extraordinary pay" when the employer determined that extra hours were needed did not encompass the incentive policy. That policy, the Board noted, involved a plan to cover "ongoing, periodic and predictable" staffing requirements such as holiday staffing needs, not "extraordinary" conditions. 11 In the absence of any evidence that the parties had consciously explored, or that the union intentionally relinquished its right to bargain about this topic, the Board held that the union had not waived bargaining over the policy.

The Board then considered the employer's unilateral implementation of an attendance and tardiness policy. The Board concluded that the contract "explicitly authorized" the employer's implementation of a disciplinary policy on attendance and tardiness even though it did not include the words "time and attendance" or "tardiness." The Board

⁷ <u>Provena St. Joseph Medical Center</u>, supra, slip op. at 8.

⁸ 460 U.S. 693, 708 (1983).

⁹ Id.

 $^{^{10}}$ 350 NLRB No. 64, slip op. at 5, n.19, citing New York Mirror, 151 NLRB 834, 839-840 (1965).

¹¹ <u>Id.</u>, slip op. at 8, n.34.

found that several provisions of the management rights clause — granting the employer the right to "change reporting practices and procedures and/or introduce new or improved ones," to "make and enforce rules of conduct," and to "suspend, discipline, and discharge employees" — taken together amounted to an explicit authorization of the employer's unilateral action, 12 notwithstanding the absence of the words "time and attendance."

As <u>Provena</u> illustrates, when a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver. In interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement(s) at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement or other bilateral arrangements that may shed light on the parties' intent concerning bargaining over the change at issue. 13

Applying those factors here, we note with respect to the first factor that the language is subject to two interpretations. Each MOU initially states that the parties agree to "let the Members of USW Local 6992 enroll under the [2004 2005 2006] enrollment guidelines" and that "this agreement is limited to enrollment under the [2004 2005 2006] guidelines only." Such language could reasonably be interpreted to mean that the parties intended for the MOU to expire at the end of each guideline year. 14

¹² Id., slip op. at 8-9.

The first three of these factors are generally considered by the Board in making "clear and unmistakable" waiver determinations. See generally Johnson-Bateman, 295 NLRB 180, 184-187 (1989); American Diamond Tool, 306 NLRB 570, 570 (1992). Provena also makes clear, slip op. at 8-9, that it is appropriate to consider any other relevant contract provisions or bilateral arrangements that shed light on the contractual intent of the parties in this regard.

¹⁴ The Beneflex Plan "guidelines" specified for any given year exist for and apply to only the specified year. If an employee fails to enroll during the open enrollment period under the guidelines for a particular Beneflex Plan year, the employee could not participate in that Beneflex Plan year. The employee would have to wait until the following year's open enrollment period when he or she would become entitled to enroll under the guidelines for that following plan year.

On the other hand, the MOUs do not contain any language regarding expiration. Each only states that it applies for a limited time, i.e., during the enrollment period. 15 Even assuming that the MOUs were read as clearly setting an expiration date, they contain no clear language regarding what is to occur after the expiration of the MOU. 16 The fourth Provena factor, reference to any other provisions or agreements, does not resolve this issue.

We conclude, however, that the parties' past practice and consistent bargaining history clearly indicate that they intended that each MOU and its 70/30 cost share would apply only to the corresponding Beneflex Plan year. Therefore, the Employer thereafter lawfully returned to the 50/50 cost share status quo that the parties had altered by those temporally limited MOUs.

The Board ultimately decided that the Employer lawfully implemented the 50/50 cost share in 2001. In 2002, the Employer did not simply propose continuing the 70/30 cost share, but rather offered the Union a choice of either the 50/50 cost share or a 70/30 cost share. The Union chose not to agree to a 70/30 cost share; the cost share therefore remained at 50/50. At this point, the parties reasonably should have understood the status quo to be the 50/50 cost share.

In 2003 the Employer again presented the Union with this choice. The Union chose to agree to the 70/30 cost share, conditioned upon the parties agreeing that the Union was not waiving any rights regarding the pending Board case. The parties then signed the 2003 MOU. In 2004, the Employer again offered the Union the choice of agreeing to either the 70/30 cost share or the 50/50 cost share.

The Employer's 2004 offer, which sought another Union agreement to the 70/30 cost share, would have been wholly unnecessary if the parties, including the Union, had

¹⁵ Thus, the language could reasonably be interpreted to mean that the employees would remain enrolled, or continue to enroll, under the agreed upon guidelines until the MOU were modified or the parties reached impasse. Such an interpretation would tend to indicate that the parties did not intend for the Employer to have the right to unilaterally change the cost share after the plan year ended.

¹⁶ Compare General Tire, supra with <u>Cauthorne Trucking</u> supra, described above in footnote 6.

intended their initial 2003 MOU to apply beyond the 2004 Beneflex Plan year, rather than expire and thereby return the employees to the 50/50 cost share. In particular, the Union would not have agreed to this second MOU in 2004 if the Union had intended that the initial 2003 MOU required the Employer to continue the 70/30 cost share beyond the 2004 Beneflex Plan year. If the Union did have such a belief and intention, it would have simply indicated that the Employer was obligated to continue the 70/30 cost share, and would have rejected the Employer's unnecessary offer of a redundant MOU. The Union did no such thing; it instead willingly signed the 2004 MOU. The only reasonable explanation of that sequence of events is that the Union did so because it did not believe the 2003 MOU applied the 70/30 cost share beyond 2004, and did not believe that the 70/30 cost share was the status quo.

Moreover, in 2005, the Employer offered an ongoing MOU which would have continued the 70/30 cost share from year to year. An ongoing MOU would have eliminated the Employer's right to offer the Union an annual choice between the 50/50 and the 70/30 cost shares for each succeeding Beneflex Plan year. In rejecting the Employer's ongoing MOU offer, the Union clearly rejected the 70/30 cost share as the status quo and accepted the Employer's right to offer, or not offer, a choice between the 70/30 and 50/50 cost shares for the following Beneflex Plan year.

In 2006, when the parties began bargaining for a new contract, the Employer offered to eliminate the 50/50 cost share as a part of its proposed contract and replace it with the 70/30 cost share. The Employer requested that the Union in return agree to include the 70/30 cost share as part of a "basic" contract with certain other changes then bargain later about the remaining issues. In making this proposal, the Employer made clear that the cost share would remain 50/50 and that it would no longer enter into MOUs that deviated from that allocation. The Union protested this as an unlawful unilateral change from what it claimed was the status quo, i.e. the 70/30 cost share.

We conclude to the contrary. The parties' annual signing of three individual MoUs applying the 70/30 cost share to each individual Beneflex Plan year, in conjunction with the Union's rejection in 2005 of an ongoing MoU which would have prevented the Employer from making annual offers, clearly indicates that the Union intended the 70/30 cost share in each MoU to apply only to each individual Beneflex Plan year and then to terminate. Therefore, the Employer was privileged to reinstate the underlying 50/50 cost share.

Intermountain Rural Electrical Assn., 17 on which the Charging Party relies, is distinguishable. There, the contract provided employees with a choice of medical insurance programs to be paid for by the employer, except that the employer's maximum premium contribution "shall not exceed" 100 percent of the Blue Cross medical premium. After the contract had expired and Blue Cross had announced a new higher premium, the employer paid the previous year's lower Blue Cross premium, arguing that payment of that premium merely continued the status quo ante. The Board found an unlawful unilateral change because contract language had not specified any dollar amount, but rather the payment of the Blue Cross premium in any given year. The Board specifically found no union bargaining waiver because the employer had announced its refusal to pay the new Blue Cross premium as a fait accompli. In contrast, the instant case does not involve an Employer announcement as a fait accompli, but rather involves a three-year past practice and bargaining history, including the Union's agreement to three individual MOUs covering one year periods. As discussed above, these clearly demonstrate that the Union waived its right to bargain over the Employer's cessation of the 70/30 cost share and reinstatement of the underlying 50/50 cost share after the last MOU.

Accordingly, the Region should dismiss the charge, absent withdrawal, because the Union waived its right to bargain over the termination of the 70/30 cost share after the 2006 Beneflex year.

B.J.K.

 $^{^{17}}$ 305 NLRB 783, 784-87 (1991), enfd. 984 F.2d 1562 (10 $^{\rm th}$ Cir 1993).